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No. 99

In the Supreme Court of the United States

OCTOBER TERM, 1962

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BOSTON AND MAINE RAILROAD, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

PETITION FOR REHEARING

ROBERT W. GINNANE,
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On May 20, 1963, this Court entered the following order in this case (and in Nos. 97 and 98):

> PER CURIAM.
>
> The judgment is affirmed by an equally divided Court.
>
> Mr. JUSTICE WHITE took no part in the consideration or decision of this case.

Appellant Interstate Commerce Commission respectfully requests that the Court order rehearing in these consolidated appeals.

This Court on occasion has granted petitions for rehearing in cases where the original argument resulted in an automatic per curiam affirmance by an equally divided Court. In some of such cases, rehearing has produced a decisive majority in the Court and

an opinion stating the grounds for decision.[1] We submit that the importance of the issues involved, together with the possible aftermaths of the decision below, warrant rehearing by this Court in the hope that further exploration of the issues might result in a majority.

In the original argument before this Court, there was no challenge to our contention that the real issue before the Court was whether the Commission was required to prescribe rate parity as between railroads serving the northern tier ports and railroads serving the southern tier ports, on a large volume of export-import traffic originating in or destined to the so-called differential territory, without regard to the undisputed distance and cost advantages of the southern lines. It is as obvious as it is undenied that the railroads serving the northern tier ports are not seeking a rate war (which they cannot afford) which would simply result in maintenance of the existing rate differentials on export-import traffic *at a lower rate level*. The appellee northern lines made clear in their pleadings filed before this Court that the issue was

[1] *Railroad Commission of California* v. *Pacific Gas & Electric Co.*, affirmed by an equally divided Court, 301 U.S. 669, rehearing granted, 302 U.S. 771, reversed (6 to 2), 302 U.S. 388; *Gray* v. *Powell*, affirmed by an equally divided Court, 312 U.S. 696, rehearing granted, 313 U.S. 596, reversed (5 to 3), 314 U.S. 402; *Lichtenba* v. *California*, affirmed by an equally divided Court, 313 U.S. 537, rehearing granted, 313 U.S. 597, affirmed (7 to 2), 314 U.S. 219; *Halliburton Oil Well Cementing Co.* v. *Walker*, affirmed by an equally divided Court, 326 U.S. 696, rehearing granted, 327 U.S. 812, reversed (8 to 1), 329 U.S. 1; *Ladner* v. *United States*, affirmed by an equally divided Court, 355 U.S. 282, rehearing granted, 356 U.S. 969, reversed (8 to 1), 358 U.S. 169.

whether the Commission was required to enforce rate parity. It is fairly clear that they will urge that the decision below, as affirmed by this Court, stands for that proposition. Thus, the Journal of Commerce for May 22, 1963, discusses the consequences of this Court's order of May 20, under the heading *"Feel Principles Set* Northern Tier Ports Confident on Rate Cuts", in part as follows:

> Jubilant New York port and railroad officials believe that their Supreme Court victory on Monday gives them sufficient ammunition to fight off any new attempt to restore the railroad rate differential favoring ports to the South.
>
> * * * * * *
>
> John H. Colgren, counsel for the New York Central, commented yesterday that "the commission has the duty not to let rates gravitate to the lowest level."
>
> The Supreme Court has said many times that the ICC has "ample power" to prevent such a downward rate spiral, with its harmful effect on the transportation system, he declared.
>
> Moreover, Mr. Colgren said, the southern tier ports and carriers must "build a record" before they can launch any attempt to regain the differential. This means, he said, that the parity rates must be given a chance, to show whether or not they are detrimental.
>
> Now that the Supreme Court has affirmed the Boston decision, the latter is "the law of the land" and the burden of proof would rest on the southern carriers if they tried to put

through rates restoring the differential, Mr. Colgren pointed out.

* * * * * *

Clearly, the appellees are contending that the judgment and opinion of the court below supports their basic position. The judgment employs unique language in setting aside the Commission's order "insofar as it directs the cancellation of schedules proposing differential-eliminating rates to and from the Ports of Portland, Maine, Boston, Massachusetts, Albany and New York, New York, * * * and prevents differential-eliminating rates from becoming effective * * *". Obviously, the appellees contend that the concept of "differential-eliminating rates" precludes the southern lines from making retaliatory rate reductions, even though cost-justified, which would restore the differentials at a lower rate level. However, the opinion of the court below, while emphasizing the right of the appellee northern lines to reduce their rates to meet competition, is silent as to whether and to what extent the southern lines may assert a similar right to reduce their rates for competitive reasons. Cf. *Interstate Commerce Commission et al. v. New York, N. H. & H. R. Co. et al.*, 372 U.S. 744.

Also, the court below stated in its opinion (R. 4004), that "Distance differences might be relevant insofar as they reflect differences in the cost and value of the services of [appellee] and [appellant] railroads, * * * but the Commission made no such cost or value findings nor does the record contain evidence from which it could make such findings." It is enough now to point out that before this Court

there was no challenge to the Commission's finding (R. 3805–6) that "The greater distance of the northern tier ports from the affected territory, and the higher costs of service to and from those ports, are firmly established."

Thus, there is squarely presented the question of whether the Commission, in applying Section 3(1) of the Interstate Commerce Act to the problems of export-import rates to and from competing ports, may apply such transportation standards as relative distance and cost, or whether these standards must be wholly subordinated to the "competitive" principle of enforced rate parity. If, as we contend, the 1935 amendment to Section 3(1) was intended to abrogate this Court's reliance upon the "competitive" principle in *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627 (1933), it is peculiarly important to determine whether the will of the Congress has been effectuated. An authoritative construction of Section 3(1), as amended in 1935, is needed to guide carriers, ports, Commission and lower courts in the recurrent rate controversies between competing ports and the railroads serving them.

Looking only to the immediate possible consequences of the decision below, it should be noted that the direct competitive relationships between the appellant and appellee railroads and the North Atlantic ports which they serve respectively, present by far the most important of the various port competition situations in the country. We do not know what course of action the southern lines will attempt to pursue. If they propose countervailing rate reductions, does the

decision below require the Commission to find such reductions unlawful—even though shown to be cost-justified? If, on the other hand, such countervailing rate reductions become effective, must the Commission permit the northern lines to reduce their rates still further regardless of costs?

The importance to all concerned of an authoritative disposition of the basic questions involved by this Court is further illustrated by the long and continuing controversy between most of the same railroads and ports over rates on imported iron ore. The history of the administrative proceeding and of the proceedings of the various Federal courts with respect to iron ore is summarized and discussed in our brief filed in this Court in the present case (I.C.C. brief p. 3, fn. 1; 40–42). It is clear that the ultimate determination of the iron ore controversy will involve at least some of the basic issues involved in this case. The prior judicial history of that controversy leaves no doubt that it will again be presented to this Court. We submit that it would be infinitely preferable to resolve these questions now in this case which involves many commodities and has a far greater impact upon carrier revenues and the interests of the various ports.

Accordingly, we respectfully submit that this petition for rehearing should be granted.

ROBERT W. GINNANE,
General Counsel,
I. K. HAY,
Deputy General Counsel,
Interstate Commerce Commission,
Washington 25, D.C.

JUNE 1963.

CERTIFICATE

I certify that this petition is presented in good faith and not for purposes of delay.

ROBERT W. GINNANE.